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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 97

THE UNITED STATES, PETITIONER

v.

JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-
PARTNERS, DOING BUSINESS AS J. W. MOORMAN &
SON

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 36-42) is reported at 82 F. Supp. 1010.

JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1949 (R. 42). The petition for a writ of certiorari was filed on June 3, 1949. The petition was granted on October 10, 1949 (R. 42). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims may, in the absence of any finding or suggestion of bad faith or gross error, substitute its own judgment with respect to work required to be performed under a government construction contract for that of the head of the contracting agency, despite a specific contractual agreement, consented to by the complaining contractor, that the administrative decision on this issue "shall be final and binding upon the parties to the contract."

CONTRACT PROVISIONS INVOLVED

Article 15 of the contract provides:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 2-03 (e) of the specifications provides:

Conflicts.—

(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

Paragraph 2-16 of the specifications provides:

Claims, Protests and Appeals.

(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified, and within the time

limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract.

STATEMENT

Respondent partnership entered into a contract with the United States for the grading of the site of the Oklahoma City Aircraft Assembly Plant (R. 24). During the performance of the contract a dispute arose with respect to whether the grading of a taxiway to an adjacent air depot was called for by the contract (R. 24-25). The contractor performed the work at the contracting officer's direction, but sought additional compensation on the ground that it was not covered by the contract (R. 29-30). After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, the contractor sued for additional compensation in the Court of Claims and recovered a judgment in the amount of \$105,502.17 (R. 31, 33, 42). The facts found by the Court of Claims are as follows:

Invitations for bids for the grading contract were sent to prospective bidders, including plaintiffs, on March 26, 1942 (R. 25). Plaintiffs' bid of 24¢ per cubic yard for an estimated quantity of one million cubic yards was accepted (R. 28). A "letter contract" was accepted by plaintiff on April 7, and about June 1, 1942, a formal contract effective as of April 3, 1942, was executed (R. 28).

In all respects pertinent here the formal contract followed the form of United States Standard Form 23 Revised, which contained the standard Article 15 provision for the administrative determination of all disputes concerning questions of fact (R. 28). *Supra*, p. 2. Paragraph 2-16 of the specifications added by the War Department contained the usual provision with reference to "Claims, Protests and Appeals" making final and binding upon the contracting parties the decision of the Secretary of War or his duly authorized representative upon protests with respect to the work required by the contract (R. 28-29, 10). *Supra*, pp. 3-4.

Upon being required to perform the grading of the taxiway in question, plaintiffs claimed this work was not called for by the contract and submitted their protest under Article 15 of the contract and paragraph 2-16 of the specifications (R. 29-30). Plaintiffs claimed 84¢ per cubic yard for this grading work instead of the 24¢ per cubic yard allowed under the contract (R. 30). The

contracting officer held that grading of the taxiway was within the requirements of the contract and that the contract unit price provided just compensation for the work performed (R. 32). Accordingly, he denied the request for additional compensation (R. 32).

The contracting officer's conclusions were based upon the following recitals of fact which appeared in his opinion (R. 31-32, cf. R. 18-22): At the time the drawings for the contract were being prepared, it was known by all concerned that a taxiway was to be constructed and, although the exact location had not been determined, that it would be located near the boundaries of the air depot and the adjoining assembly plant (R. 31). The specifications for grading the assembly plant site provided for the grading of taxiways, and prospective bidders were informed of the approximate location of the taxiway area by a designation on the drawings of the "Taxiway Proposed" which later proved to be its actual location (R. 31). The drawings furnished with the invitation for bids showed the Taxiway Proposed with the red pencil notation "Taxiway Grading Included in Grading Plant Site" (R. 31). Although the drawings furnished with the formal contract did not bear the red pencil markings, the contracting officer found that the specifications and drawings clearly showed that the work under the contract included the taxiway in question (R. 32).

Plaintiffs appealed to the Secretary of War from the denial of this claim and another claim (not involved here) based on work they were required to perform with respect to the grading of an industrial road within the air depot area (R. 32-33). In accordance with the usual War Department practice, these claims were referred to the War Department Board of Contract Appeals which upheld the contracting officer's decision relating to the taxiway but reversed with respect to the industrial road (R. 33, 34). Without relying upon the red pencil markings on the drawings (to which the contracting officer had referred), the Board's opinion, advertent to the fact that both the specifications and the drawings used the word "taxiways" or "Taxiway (proposed)," stated "there is no escape from the conclusion that the grading contemplated by the contract includes grading of the taxiway" and "there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof" (R. 33-34).¹

Without suggesting that the decisions of the contracting officer and the Board (the Secretary of War's designee) were in bad faith or grossly erroneous, the Court of Claims reached its own conclusion that they "cannot be sustained under the facts and the specifications and drawings"

¹ The Board of Contract Appeals' decision (BCA No. 167, January 21, 1944) is reported at 2 *Contract Cases Federal* (Commerce Clearing House) 178.

(R. 37). The Court of Claims refused to give effect to paragraph 2-16 of the specifications, providing that the Secretary of War's decision with respect to the work required by the contract was final and conclusive, on the ground that this paragraph must be read in connection with Article 15 which was limited to questions of fact (R. 39-40). The decision of the Board of Contract Appeals (acting for the Secretary of War) was held to be based upon an interpretation of the contract documents and not a question of fact within the meaning of Article 15; and accordingly not binding in any way on the contractor or the court (R. 41).² The court's judgment allowed

² The court found, on the evidence before it, that, as a matter of fact, the drawings actually furnished to respondents with the bid invitation did not contain any red pencil markings indicating that the air depot taxiway was included (R. 25). As a matter of law, it interpreted the word "taxiways" in the pertinent specifications (R. 11, 13, 26) as referring to certain other areas which were to be graded for hard surfacing, although these areas were not designated in the drawings as "taxiways", only the area here in controversy being so marked, and although all the other items listed in the specifications for grading were designated by name on the drawings (R. 26-7, 32, 38-9).

The opinion states that petitioner conceded on argument in the Court of Claims that respondents "never received the drawing marked in red to indicate that the taxiway and connecting areas * * * were to be included in the contract," (R. 37), and this was stressed by respondents in opposing the petition for certiorari (Br. in Opp. 5, 6). We respectfully submit, however, that the only "concession" was that the Government was not prepared to prove *de novo* in the court below respondents' actual receipt of the drawing in question.

the plaintiffs 59.3¢ per cubic yard for the work performed in grading the taxiway and awarded a judgment in the amount of \$105,602.17, as the sum owing in addition to the 24¢ per cubic yard previously paid (R. 41-42).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to give finality to the administrative determination with respect to the work requirements of the contract.
2. In holding that paragraph 2-16 of the specifications did not extend to disputes relating to the work required by the contract.
3. In holding that, if construed to extend to an interpretation of the work required by the contract, paragraph 2-16 of the specifications would be inconsistent with Article 15 of the contract, and therefore unauthorized and invalid.
4. In holding that respondents, who agreed to the incorporation into the contract of paragraph 2-16 of the specifications and made use of its provisions, may attack its validity or the War Department's authority to agree to its use.
5. In entering judgment for respondents in the sum of \$105,502.17.

SUMMARY OF ARGUMENT

In refusing to accord finality to the decision of the administrative agent designated by the contract, the Court of Claims disregarded the spe-

cific terms of the contract and the consistent decisions of this Court, which have long upheld the general validity of contract provisions making the contracting officer, or some other official, the final arbiter of the meaning of the plans and specifications, or of the work to be performed under the contract. The clause providing for the conclusive administrative settlement of disputes as to the work required under the contract precisely covered the dispute in question, and can only be read as giving binding effect to the administrative decision. There was no claim or finding of bad faith or gross error implying bad faith in the War Department's determination that the grading of the disputed taxiway was within the requirements of the contract. In these circumstances, the court below was without authority, under the controlling principles, to disregard this finding and to make a *de novo* determination of its own.

There is no merit in the suggestion of the Court of Claims that the provision of the specifications committing disputes of this character to administrative determination is unenforceable and invalid as inconsistent with Article 15 ("Disputes") of the standard form of government construction contract. In the first place, the language of Article 15, which is itself limited to disputes of fact, explicitly permits exceptions. Secondly, a dispute with respect to the work requirements of a contract may very

well be deemed a question of fact, or such a mixed question of law and fact as to be fairly within the scope of Article 15; at the least, the close affinity between the issues determinable under Article 15 and those involving the meaning of plans and specifications makes it impossible to say that a clause expressly dealing with the latter is an improper deviation from, or inconsistent with, the standard disputes article. Moreover, clauses of the type involved here have long been used in conjunction with the standard article, and have never been considered inappropriate or in conflict. The last and completely dispositive answer to the argument of invalidity because of deviation from the standard form is the specific authority conferred upon the War Department by Title II of the First War Powers Act and Executive Order No. 9001 to draft contracts free of all standard form restrictions; under this authority the war agencies departed at will from the prescribed forms throughout the war period.

Finally, respondents are in no position in any event, to assert that they are not bound by the provisions of a contract to which they gave their assent, because of an alleged inconsistency between the specifications and the prescribed standard form contract. Any inhibition which may have been imposed upon the contracting agency's authority to include the disputed provision in the specifications is merely a part of

the internal management of the Government's procurement functions and confers no justiciable rights upon private contractors.

ARGUMENT

I

IN THE ABSENCE OF BAD FAITH OR ERRORS SO GROSS AS TO COMPEL AN INFERENCE OF BAD FAITH ON THE PART OF THE ADMINISTRATIVE OFFICERS, THEIR DECISION OF A QUESTION CONCERNING THE WORK REQUIRED BY THE CONTRACT, SPECIFICALLY COMMITTED TO THEM BY THE CONTRACT, IS FINAL.

The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2, 7), provides that "If the contractor considers any work demanded of him to be outside the requirements of the contract" he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may appeal to the Secretary of War "whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract." *Supra*, p. 3. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted its judgment for that of the Secretary of War to whom the final decision of this precise question had

been specifically committed by the unambiguous provisions of the contract.

The lower court's failure to give effect to the contract provisions conflicts squarely with the applicable decisions of this Court. There would appear to be no need to labor the point that, in the language of a protesting letter from respondents to the Government's contract manager (R. 17), respondents' contention has been that their "contract, plans and specifications did not cover the grading called for." And the contract terms, providing for final administrative determination of exactly such questions, "are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the [administrative officials] * * * was intended to be conclusive." *Kihlberg v. United States*, 97 U. S. 398, 401. The obvious purpose of such provisions is to avoid the expense and delay of litigation. Cf. *United States v. Holpuch Co.*, 328 U. S. 234, 239-240; *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 553. Equally obviously, this purpose is defeated if parties who agree to the contract terms can have them nullified because they are dissatisfied with a decision by which they have contracted to be bound. Accordingly, this Court, uniformly holding provisions of the type in question valid and enforceable, has ruled repeatedly

that determinations under such provisions "in the absence of fraud or of mistake so gross as to necessarily imply bad faith, * * * will not be subjected to the revisory power of the courts." *United States v. Gleason*, 175 U. S. 588, 602; *United States v. McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393; *Plumley v. United States*, 226 U. S. 545, 547; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 553-554; *Kihlberg v. United States*, 97 U. S. 398, 402; *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768; *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234.

These cases, together with a large number of lower federal and state court decisions (see *infra*, p. 18, fn. 5), have long settled the general propriety of contract provisions placing the resolution of disputes of the character involved here in specified officers or parties. In particular, the instant case is virtually on all fours with *United States v. McShain, Inc.*, *supra*, in which the Court of Claims refused to give finality, as required by the specifications,³ to the contracting officer's interpretation of the material called for by the specifications on the ground that the par-

³ The specifications contained a clause stating: "The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final."

ties could only stipulate to the finality of determinations of fact. This Court reversed the decision of the Court of Claims *per curiam* and without opinion. The considerations which prompted the Court's decision, in 1939, in the *McShain* case would seem more forcibly controlling here in view of the elimination by that decision of any possible doubt of the applicable rule.* But nevertheless the Court of Claims continued to render a series of decisions requiring corrective action by this Court, of which the present holding is the latest, in which it refused, without adequate basis, to apply the established provisions of government construction contracts for the administrative settlement of designated disputes. *United States v. Callahan-Walker Constr. Co.*; *United States v. Blair*; *United States v. Beuttas*; *United States v. Joseph A. Holpuch Co., supra*.

Such administrative determinations are not, of course, binding on the parties or the courts if made in bad faith. But nowhere in their petition to the court below did respondents allege that the administrative ruling they attacked was the product of fraud or bad faith (R. 1-4). Nor is

* Article 15 ("Disputes") in the *McShain* case was not limited to questions of fact. This is not a significant difference since our reliance here, as in *McShain*, is not on Article 15 but on the pertinent paragraph in the specifications quoted above (*supra*, pp. 3-4, 12, 14, fn. 3), which is not limited to questions of "fact".

there any intimation in the opinion below or elsewhere in the record that such is the basis for the decision under review.

In support of its refusal to give finality to the administrative decision, the lower court reasoned that Paragraph 2-16 of the specifications (*supra*, pp. 3-4) was merely "a procedural provision" implementing Article 15, which provided for administrative resolution of disputed questions of fact (R. 39). Read in this way, the court concluded, Paragraph 2-16 did not authorize "interpretation of the contract documents which is not a question of fact within the meaning of Article 15" (R. 41). But to read the paragraph in this way is to deprive it of any conceivable meaning the parties to the contract could have intended by it. Leaving for later discussion (*infra*, pp. 21-25) the argument that the disputed question may very well be considered one of fact, it seems clear beyond possibility of doubt that it is necessary to "interpret" the contract documents in order to determine whether a given item of work is "outside the requirements of the contract." It is clear, therefore, that the contract's unambiguous language provides for such interpretation by the contracting officer in the first instance and by the Secretary of War (or his "duly authorized representative"—here, the Board of Contract Appeals) as final arbiter. Unless the provision involved is one to which the parties could not

validly agree, the conclusiveness with which this Court's decisions endow it cannot be escaped by reading it out of the contract.

II

THERE IS NO BASIS FOR INVALIDATING THE CONTRACT PROVISION COMMITTING DISPUTES CONCERNING WORK REQUIRED BY THE CONTRACT TO FINAL ADMINISTRATIVE DECISION

The court below held, in effect, that if construed to extend to the dispute in issue, paragraph 2-16 of the specifications would be inconsistent with Article 15 and therefore invalid, because the contracting officials have no authority to depart from the terms of the standard form contracts. This is made clear by the court's reliance (R. 39, 41) upon its decision in *Pfotzer v. United States*, 111 C. Cls. 184, certiorari denied, 335 U. S. 885, where the theory of invalidity because of inconsistency with the limitation of Article 15 to disputed questions of fact is more fully developed.

Neither general law, nor Government regulations, nor the terms of Standard Form No. 23, however, barred the use of these provisions, during time of peace or war. Moreover, the War Department had clear-cut authority to deviate from the provisions of the standard form contracts during the war period.

A. GOVERNMENT PROCUREMENT REGULATIONS REQUIRING THE USE OF STANDARD CONTRACT FORMS HAVE NOT PROHIBITED THE INCLUSION OF A DISPUTES CLAUSE OF THIS CHARACTER

Courts throughout the country—this Court, the Court of Claims, and other tribunals—have long

upheld, as properly includible in construction contracts, clauses expressly giving the power of final interpretation of plans and specifications to designated officials.* As the multitude of cases shows, such provisions have had wide usage for many years, both in Government and in private agreements.* The lower court neither suggests any change in the settled judicial law on the point of ultimate power to contract for this type of clause, nor that any statute now requires a different decision, but it held in the *Pfotzer* case, and repeats here (R. 39-40), that, at least since the establishment of centralized procurement in 1933, authority has been withdrawn by the Treasury's Procurement Division from government contracting agents to insert these provisions in government construction contracts.⁷ The court points

* *E. g.*, *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393; *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *McBride Electric Co. v. United States*, 51 C. Cls. 448, 455-6; *B-W Construction Co. v. United States*, 101 C. Cls. 748, 768 (reversed on other points *sub nom. United States v. Beuttas*, 324 U. S. 768); *Langevin v. United States*, 100 C. Cls. 15, 40-41; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 417; *United States v. Madsen Const. Co.*, 139 F. 2d 613, 614, 616 (C. A. 6); *English Const. Co., Inc. v. United States*, 43 F. Supp. 313 (D. Del.); *Tobin Quarries, Inc. v. Central Nebraska Public Power & Irr. Dist.*, 64 F. Supp. 200, 208-210 (D. Neb.), affirmed, 157 F. 2d 482 (C. A. 8), and state and federal decisions there cited.

* See cases cited and referred to in fn. 5, *supra*, and also *infra*, pp. 25-30.

⁷ By Section 1 of Executive Order No. 6166, June 10, 1933 (note following 5 U. S. C. 132), the Procurement Division

to the "Disputes" clause of the standard form (Article 15), which deals with "questions of fact,"* and founds the invalidation of the disputes provision upon the "Directions for Preparation of Contract," attached to Form No. 23, which state: "There shall be no deviation from

of the Treasury Department (later called the Bureau of Federal Supply, 11 Fed. Reg. 13638) was authorized to supervise procurement throughout the Federal Government, and to require use of approved contract forms. 41 C. F. R. 1.1-1.2, 11.1-11.3. U. S. Standard Form No. 23 ("Construction") was promulgated under this authority, and was to be used "for every formal contract for the construction or repair of public buildings or works." 41 C. F. R. 12.23, p. 1332.

By section 102 (a) of the Federal Property and Administrative Services Act of 1949 (Pub. L. No. 152, 81st Cong., 1st Sess.), approved June 30, 1949, the functions of the Bureau of Federal Supply, and its Director, were transferred to the Administrator of General Services, and the Bureau and the office of Director of the Bureau were abolished. In addition, the Federal Property and Administrative Services Act provides that the Administrator of General Services "is authorized * * * (4) to prescribe standardized forms and procedures, except such as the Comptroller General is authorized by law to prescribe, and standard purchase specifications." Section 206 (a).

* Article 15 ("Disputes") of U. S. Standard Form No. 23, which is limited to questions of fact, was involved in *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56-58. Article 15 ("Disputes") of U. S. Government Form P. W. A. 51, which form was extensively utilized on government construction contracts between 1933 and 1940, is not so limited and provides for administrative settlement of "all" disputes concerning questions arising under the contract. This was the form considered by this Court in *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768, and *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234.

this standard contract form, except as provided for in these directions, and except as authorized by the Director of Procurement" and "Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard form nor involving questions of policy, may be incorporated in the specifications or other accompanying papers" (111 C. Cls. at 226-7).

1. The short answer to this suggestion of improper deviation is that none exists, and that neither courts, Government agencies, nor contractors in general have hitherto perceived any inconsistency. Article 15 is limited to disputes concerning issues of "fact," and does not imply that other disputes cannot be handled similarly, if the parties so agree. The opening phrase ("Except as otherwise specifically provided in this contract") itself indicates room for additional provisions regarding contractual disputes to be incorporated in the agreement. The inclusion of a provision extending administrative settlement to issues of interpretation of the drawings and specifications cannot, therefore, be a deviation from, or inconsistent with, Article 15, which stands unchanged and fully effective. To the contrary, the close affinity, in construction matters, between the expertise and judgment required to determine strictly "factual" issues and that needed to solve problems of the interpreta-

tion of plans and specifications has led some Government contracting agencies to insist that Article 15 itself covers the latter, without need for a supplementary clause like paragraph 2-16 (*supra*, pp. 3-4), or a provision making the contracting officer the final interpreter of the plans and specifications, such as the *Pfotzer* contract contained. Cf. *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56 ("equitable adjustment" required by change order a "question of fact").*

2. There is more than respectable justification for this view that the interpretation of plans and specifications is a "factual" question for determination by the designated arbiter. Although the interpretation of writings has generally been considered a function of the court, the historical basis for this appears to have been the expertness of the judge in this field, rather than the fact that a question of "law", and not of "fact", was involved. See Williston, *Contracts* (Rev. ed. 1936), sec. 616; Thayer, *A Preliminary*

* The Court of Claims has, however, ruled consistently, in recent years, that interpretation of plans and specifications does not come under Article 15 of Standard Form No. 23. *Davis v. United States*, 82 C. Cls. 334, 346-347; *Callahan Construction Co. v. United States*, 91 C. Cls. 538, 616-617; *Schmoll v. United States*, 91 C. Cls. 1, 33; *John McShain, Inc. v. United States*, 88 C. Cls. 284, 296-297 (reversed, 308 U. S. 512, 520); *B-W Construction Co. v. United States*, 97 C. Cls. 92, 118; *Gerhardt F. Meyne Co. v. United States*, 110 C. Cls. 527; *Orino v. United States*, 111 C. Cls. 491; instant opinion, R. 41.

Treatise on Evidence (1898), pp. 202-207; Green, *Judge and Jury* (1930), pp. 268-279. For the ascertainment of the objective meaning of the contractual actions of the particular parties to a particular transaction, as well as of their actual intention—both of which may be involved in the interpretation of a contract document—can properly be characterized as “factual”. The matter about which the parties reached agreement in the instant case, for example, “must be discovered * * * by evidence of the facts and circumstances concerning the making of the contract.” Williston, *ibid.* Cf. Thayer, *op. cit., supra, ibid.*; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, (1944) 57 Harv. L. Rev. 753, 831, fn. 354. Indeed, the “factual” character of the present inquiry is demonstrated by the fact that the Court of Claims based its disagreement with the War Department’s determination wholly on its own appraisal of the evidence rather than upon any legal principles of interpretation of instruments (R. 25, 26-7, 37-39; see fn. 2, *supra*, p. 8).

If the historical factor of the greater expertness to make the determination be considered controlling in the distribution of the function of deciding such disputes—instead of routine distinctions between “fact” and “law”—it would seem that the interpretation of plans and specifications should be left to the administrative procedure provided by the contract. This would accord with

this Court's decisions in which deference has been given to the technical competence of administrative experts. *E. g.*, *Gray v. Powell*, 314 U. S. 402; *Dobson v. Commissioner*, 320 U. S. 489; *Labor Board v. Hearst Publications*, 322 U. S. 111; *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469; cf. Isaacs, *The Law and the Facts* (1922) 22 Col. L. Rev. 1; Brown, *Fact and Law in Judicial Review*, (1943) 56 Har. L. Rev. 899; Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, (1944) 58 Harv. L. Rev. 70. Here, the administrative determination that the plans and specifications embraced the grading of the taxiway in question was made by experienced, specialized personnel. The contracting officer, the Acting Area Engineer, was an army officer in the Corps of Engineers. The War Department Board of Contract Appeals, to which the appeal from the contracting officer's decision was taken, comprised lawyers, accountants, engineer officers, and others of long experience, who devoted their full time to the hearing of appeals. Over a period of years, the handling of hundreds of cases enabled the Board of Contract Appeals to develop a high degree of expertness in passing upon disputes arising under construction, and other Army procurement, contracts. Familiarity thus obtained with the terminology used in the drafting of specifications and plans, and with the trade customs and usages, permitted

uniformity and sureness in interpretation. Pursuant to the Memorandum of the Secretary of War, which created it, and its own regulations, the Board employed procedures like those of other administrative tribunals—hearing evidence and oral argument from both sides, reading the briefs of the parties, maintaining records of its proceedings, and rendering its decisions in writing. 10 C. F. R. Cum. Supp. 1943: 81.318e.¹⁰

In these circumstances, whether or not issues turning on the meaning of plans and specifications, such as questions of the work to be performed under the contract, be deemed technically under Article 15, it seems clear that a contract clause expressly assigning the decision of such

¹⁰ The War Department Board of Contract Appeals was created pursuant to a Memorandum of the Secretary of War, dated August 8, 1942. See 10 C. F. R. Cum. Supp. 1943, 81.318d. The Board originally consisted of three members, "one of whom [was] designated as President of the Board. There [was] also a recorder. The President of the Board and the recorder [were] required to be persons trained in the law. * * * Appointments [were] made by the Secretary of War." *Ibid.* Later, other members were added. The Board's decisions have been reported in *Contract Cases Federal* (Commerce Clearing House). On the Board, see Fain and Watt, *War Procurement—A New Pattern in Contracts*, (1944) 44 Col. L. Rev. 127, 193-4; Anderson, *The Disputes Article in Government Contracts*, (1945) 44 Mich. L. Rev. 211, 229-231.

The War Department Board and a similar Navy Board, created in 1944, were consolidated for cases arising after May 1, 1949, into an Armed Services Board of Contract Appeals, set up in a charter promulgated by the Secretaries of the Army, Navy, and Air Force.

issues to administrative officers is not a "deviation" from, or in conflict with, the terms of that Article.

3. Nor, at the time this contract was made, did the challenged clause of the specifications involve a new "question of policy," upon which the specific ruling of the Procurement Division was necessary (*supra*, p. 20). By 1942, the policy had long been established. Provisions of the same general character as paragraph 2-16—making the contracting officer the interpreter of plans and specifications—have been widely used in numerous government construction contracts for at least thirty-five years, and are now regarded as "common."¹¹ The widespread use of such clauses is proved most simply by a survey of the Government contract cases in this Court and the lower courts.¹² This conclusion is confirmed by an ex-

¹¹ Anderson, *The Disputes Article in Government Contracts* (1945), 44 Mich. L. Rev. 211, 215, 238-239; *B-W Constr. Co. v. United States*, 101 C. Cls. 748, 768 ("It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * *").

¹² The cases in this Court in which it clearly appears that the contract contained such a provision are: *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393 (1916); *United States v. John McShain, Inc.*, 308 U. S. 512, 520 (1939); *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 237 (1946). Recent cases in the lower federal courts are: *Fred R. Comb Co. v. United States*, 100 C. Cls. 259, 260; *King v. United States*, 100 C. Cls. 475, 482; *Fleisher Eng. & Constr. Co. v. United States*, 98 C. Cls. 139, 141; *Langevin v.*

amination of the Government's construction-contract records back to 1920, which reveal that they have been used by various government bureaus doing construction work, and consistently by the main such agency, Public Buildings Administration and its predecessors.¹³ Specifically, similar

United States, 100 C. Cls. 15, 26; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 413, 417, 422; *United States v. Madsen Constr. Co.*, 139 F. 2d 613, 614 (C. A. 6); *English Constr. Co. v. United States*, 43 F. Supp. 313 (D. Del.).

¹³ The old Office of the Supervising Architect included in its "General Conditions" a provision that "The decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final," or, later (*e. g.*, 1932), that "The decision of the Contracting Officer or his duly authorized representative as to the proper interpretation of the drawings and specifications shall be final." By Executive Order No. 6166, June 10, 1933 (*supra*, pp. 18-19, fn. 7), the Office of the Supervising Architect was transferred to the newly created Procurement Division of the Treasury Department. The same clause was used by the Public Buildings Branch of the Procurement Division (successor to the Office of the Supervising Architect). By Reorganization Plan No. 1, effective July 1, 1939, 53 Stat. 1423 (note following 5 U. S. C. 133t), the Public Buildings Branch was transferred to the Federal Works Agency, and became known as Public Buildings Administration. That Administration has at all times retained the clause in the "General Conditions" to its construction contracts, and employs it currently. (By Section 103 of the Federal Property and Administrative Services Act of 1949 (Pub. L. No. 152, 81st Cong., 1st sess.), approved June 30, 1949, the Public Buildings Administration was abolished and its functions transferred to the Administrator of General Services).

In addition, the cases cited above (fn. 12), indicate that a similar clause has been used by many other government

provisions were widely used in general construction specifications, both before the initial adoption of Standard Form No. 23 in 1926 and thereafter, including the fifteen-year period since the Procurement Division was granted authority to require the use of standard forms (see fn. 7, *supra*, pp. 18-19). The Procurement Division and the Bureau of Federal Supply have been cognizant of, and have always regarded, the inclusion of such clauses together with Standard Form No. 23 as wholly unexceptionable. This is shown most vividly by the fact that the Procurement Division's own Public Buildings Branch made use of the combination from 1933 to 1939, and that since its transfer in that year, the Public Buildings Administration, the chief government construction agency, has uniformly employed a "proper interpretation" clause in the General Conditions of its specifications.¹⁴

agencies, including the War Department, the Bureau of Indian Affairs, the Department of the Interior, Public Works Administration, and the Civil Aeronautics Administration.

¹⁴ Even if such clauses be regarded as technical deviations from, or inconsistent with, Article 15, the established practice of fifteen years indicates tacit authorization by the Director of Procurement (as he then was). (See *supra*, pp. 19-20, 25-27.) Paragraph 2-03 (e) of the specifications of respondents' contract expressly provides that "in case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract." *Supra*, p. 3.

Paragraph 2-16 of the present contract (*supra*, pp. 3-4) is simply a more specific version of the usual type of general "interpretation" provision, necessarily involving no more and no less than the interpretation of plans and specifications in the specified field of the work required by the contract. And, as the court below points out (R. 39) the equivalent of paragraph 2-16 "has * * * come to be a standard provision." At least as early as 1936, the Army's Engineer Department was including a similar paragraph in its contracts.¹⁵ Here, too, such long-established administrative practice negates the view that the disputed provision is a deviation from, or inconsistent with, the standard form, or involves an unsettled matter of policy. Cf. *Inland Waterways Corp. v. Young*, 309 U. S. 517, 525; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. Midwest Oil*

¹⁵ In its Standard Form of Specifications for Dredging, as revised to May 1936, the Engineer Department included the following:

1-13. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See arts. 3 and 15 [procedure for initial resolution and final administrative appeals on disputed questions of fact] of contract.)

See also fn. 19, *infra*, p. 32.

Co., 236 U. S. 459, 473. It wholly justifies the declaration by the Court of Claims in 1940 that an identical provision was "valid and enforceable" (*Silas Mason Company, Inc. v. United States*, 90 C. Cls. 266, 269-70, 276), and destroys any possible basis for a contrary position today.

4. Not only is the instant decision in conflict with the settled practice, and unsupported by the terms of Standard Form No. 23, but it constitutes a complete about face from recent decisions of the Court of Claims on all fours with this one. In *Langevin v. United States*, 100 C. Cls. 15, 25-26, 40-41 (1943), the standard form was used, with the normal Article 15, and the specifications contained a clause making the contracting officer the interpreter of the drawings and specifications; the court below did not hesitate to recognize and apply the latter provision. *McCloskey & Co. v. United States*, 103 C. Cls. 254, 255-256, 264-265 (1945), involving a similar coupling of disputes provisions, expressly rested on the "proper interpretation" clause in holding that the plaintiff could not recover for certain back counters in a government cafeteria which it claimed were not called for by the plans and specifications, but which the contracting officer required to be built. In *Union Paving Co. v. United States*, 107 C. Cls. 405, 408-409, 417 (1946), with similar contract and specifications,

the court relied on the broad interpretation provision in the specifications in holding that the contractor could not recover for having to use more concrete than it believed was called for by the specifications. And *Silas Mason Company, Inc. v. United States, supra*, saw no defect in a specifications clause identical (on this point) with paragraph 2-16 of respondent's contract. Not only the novelty but the error of the instant opinion, and of the earlier *Pfotzer* decision are underscored by these prior holdings of the Court of Claims itself.

B. IN ANY EVENT, EXPRESS AUTHORITY EXISTED FOR DEVIATING FROM THE STANDARD FORMS DURING THE WAR

In any event, during World War II, the War Department (the contracting agency here) was freed by Title II of the First War Powers Act (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U. S. C. App. 611) and by Executive Order No. 9001 (3 C. F. R., 1941 Supp., pp. 330-332, December 27, 1941) from the requirement of using the Procurement Division's standard forms. The statute authorized the President to permit the war agencies "to enter into contracts and into amendments or modifications of contracts * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts * * *," and the Executive Order delegated this power to the War Department, expressly authorizing "agreements of all kinds." As the Attorney

General said in a classic opinion on the Act and Order (40 Op. Atty. Gen. 225, dated August 29, 1942, at pp. 228, 230-231) "the grant is without any limitation whatever" (save certain specific exemptions not now relevant), and surely permitted the disregard of legislation and executive directions concerning the distribution of procurement functions within the Government.¹⁶ During the active life of Title II of the First War Powers Act, the War Department did not consider itself bound to use the peacetime standard forms, and as a matter of practice frequently departed from the terms of the Procurement Division's contracts, or instituted new forms, without seeking or securing any authorization from the peace-time contract-promulgating agency.¹⁷ Thousands upon thousands of war contracts were made which did not comply with the Treasury's regulations. The Procurement Divi-

¹⁶ The Attorney General's opinion specifically mentioned (pp. 228, 231) as among the statutes which could be superseded, the Act of February 27, 1929, 45 Stat. 1341, 41 U. S. C. 7a-7d, centralizing government purchasing in the Treasury Department. This is one of the two main acts under which the Procurement Division (later the Bureau of Federal Supply) operated. See Note following 41 U. S. C. 7. The other statute is the Act of June 17, 1910, 36 Stat. 531, 41 U. S. C. 7.

¹⁷ The War Department issued an entire series of its own standard form contracts. See *e. g.*, War Department Procurement Regulations, pars. 304, 1301-1325, 10 C. F. R. Cum. Supp. 81.304, 81.1301-81.1325. Cf. Fain and Watt, *War Procurement—A New Pattern in Contracts*, (1944) 44 Col. L. Rev. 127.

sion accepted the Attorney General's and the war agencies' views as to the scope of the First War Powers Act, and the Comptroller General did not object to the use of nonstandard forms.¹⁸ It follows that the lower court's views as to the limits of a contracting officer's authority to use the Procurement Division's standard forms are wholly irrelevant and incorrect as to all wartime agreements entered into by the many agencies endowed with power under Title II of the First War Powers Act.¹⁹

III

EVEN IF THE DISPUTED PROVISION WERE UNAUTHORIZED,
RESPONDENTS WOULD LACK STANDING TO CHALLENGE
IT

Even if the contracting officer were without authority under the requirements of Standard Form 23, or government procurement regulations, to include the disputed provision in the specifications, the contractor would have no standing to challenge that clause. Before bidding upon the

¹⁸ A memorandum recently submitted by the Bureau of Federal Supply to a Senate Committee states that after enactment of the First War Powers Act "the Military Establishment enjoyed for war purposes a complete exemption from all authority of the Bureau of Federal Supply with respect to procurement." Hearings before the Senate Committee on Expenditures in the Executive Departments, 80th Cong., 2d sess., on the proposed Federal Property Act of 1948, p. 129.

¹⁹ The "Claims, Protests and Appeals" provision (paragraph 2-16 of the specifications, *supra*, pp. 3-4) was used by the War Department during at least a substantial part of the war period. See Anderson, *The Disputes Article in Government Contracts* (1945) 41 Mich. L. Rev. 211, 214.

project, respondents were furnished with copies of the specifications containing paragraph 2-16 ("Claims, Protests and Appeals") (R. 2-3, 10). The "Letter Contract" accepted by them on April 7, 1942 expressly incorporated the specifications (R. 1, 5). The formal contract, later executed by both parties, likewise made the pertinent specifications "a part" of the contract (R. 7). The very provision now attacked as invalid was thus made known to respondents at the earliest possible time, and was voluntarily accepted and agreed to by them, without any protest so far as we are aware. In addition, when disputes arose, respondents made full use of the review mechanism of paragraph 2-16 (*supra*, pp. 3-4) to procure appellate decisions by the War Department's Board of Contract Appeals.²⁰

"The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Co. v. Harding Glass Co.*, 283 U. S. 353, 356. There is nothing in the nature of Government contracts which alters this general rule and grants to a contractor freely agreeing to, and making use of, a contract term the privilege of later repudiating it when it works to his disadvantage. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113,

²⁰ On one question (not involved here) involving interpretation of the plans and specifications, the Board of Contract Appeals upheld respondents rather than the contracting officer. See 2 *Contract Cases Federal* (Commerce Clearing House) 902. *Supra*, p. 7.

127, 129-130; *United States v. Standard Rice Co.*, 323 U. S. 106, 111; *Priebe & Sons, Inc. v. United States*, 332 U. S. 407, 411.

The Court of Claims, however, relying on its decision in *Pfotzer v. United States*, 111 C. Cls. 184, *supra*, p. 17 (R. 39, 41), apparently finds a reason for granting respondents a unique status in the asserted absence of authority to "deviate" from the terms of the standard form construction contract issued by the Treasury's Procurement Division.² But established doctrine flatly denies that a contractor receives any private right from such a failure of the contracting officer to stay within the bounds of his contractual power. "Like private individuals and businesses, the Government enjoys the unrestricted power * * * to fix the terms and conditions upon which it will make needed purchases"; and "the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone." *Perkins v. Lukens Steel Co.*, 310 U. S. at 127 (italics supplied). The standardization of government contract forms, and the centralization of federal procurement policy in the Treasury Department in 1933, was not undertaken to confer private rights on government contractors, but to promote the uniformity and efficiency of government contracting, as the terms of the author-

²See fn. 7, *supra*, pp. 18-19, for the Procurement Division's authority to prescribe standard form contracts.

izing Reorganization Act make clear.²² If the Procurement Division's direction of uniformity was violated in this instance, the matter is one of internal housekeeping, appropriate for correction by superior executive or administrative authorities. The provisions of the contract, freely entered into by respondent, are not thereby rendered unenforceable against the private contractor.²³ In this respect, the Procurement

²² Executive Order No. 6166 (centralizing procurement functions) was issued under Title IV ("Reorganization of Executive Departments") of the Legislative Appropriation Act for the fiscal year 1933 (Act of June 30, 1932, c. 314, 47 Stat. 382, 413-415), as amended by Section 16 of the Treasury and Post-Office Department Appropriation Act of March 3, 1933 (c. 212, 47 Stat. 1489, 1517-1519), and Title III of the Act of March 20, 1933, c. 3, 48 Stat. 8, 16. These statutes empowered the President to reorganize executive agencies and functions in order "to reduce expenditures * * *," "to increase the efficiency of the operations of the Government * * *," "to reduce the number of [executive] agencies," "to eliminate overlapping and duplication of effort," and to "group, coordinate, and consolidate executive and administrative agencies of the Government * * * according to major purposes." 47 Stat. 1517. See also Bureau of the Budget Circular No. 47 (November 22, 1921), reprinted in *Harwood-Nebel Construction Co., Inc. v. United States*, 105 C. Cls. 116, 129-130.

²³ The question discussed here concerns only the supposed deviation from the requirements of Standard Form 23 by the contracting officer in inserting paragraph 2-16 of the specifications into the contract. As we have shown (*supra*, pp. 13-15, 17-18), there is no doubt that the inclusion of such a provision could lawfully be authorized by the proper agency of the Government, and the clause in nowise infringes on the judicial power.

Division's requirements are in precisely the same class of Government-oriented internal regulations as the Public Contracts Act (*Perkins v. Lukens Steel Co.*, 310 U. S. at 127-9), the statute directing Government contracts to be in writing (*United States v. New York and Porto Rico Steamship Co.*, 239 U. S. 88, 92), and the advertising-and-low-bidder legislation (*American Smelting & Refining Co. v. United States*, 259 U. S. 75, 78; *Perkins v. Lukens Steel Co.*, 310 U. S. at 126)—all of which have been held by this Court not to confer any justiciable rights on contractors or would-be contractors.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below is erroneous and should be reversed.

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